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HOUSE BILL 207

46TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2004

INTRODUCED BY

John A. Heaton

FOR THE RADIOACTIVE AND HAZARDOUS MATERIALS COMMITTEE

AN ACT

**RELATING TO THE ENVIRONMENT; AMENDING THE AIR QUALITY CONTROL
ACT TO ELIMINATE DE NOVO HEARINGS TO THE ENVIRONMENTAL
IMPROVEMENT BOARD AND PROVIDE FOR REVIEW BY THE BOARD BASED ON
THE RECORD OF A PUBLIC HEARING.**

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

**Section 1. Section 74-2-7 NMSA 1978 (being Laws 1972,
Chapter 51, Section 4, as amended) is amended to read:**

**"74-2-7. PERMITS--PERMIT APPEALS TO THE ENVIRONMENTAL
IMPROVEMENT BOARD OR THE LOCAL BOARD--PERMIT FEES.--**

**A. By regulation, the environmental improvement
board or the local board shall require:**

**(1) a person intending to construct or modify
any source, except as otherwise specifically provided by
regulation, to obtain a construction permit from the department**

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1 or the local agency prior to such construction or modification;
2 and

3 (2) a person intending to operate any source
4 for which an operating permit is required by the 1990
5 amendments to the federal act, except as otherwise specifically
6 provided by regulation, to obtain an operating permit from the
7 department or the local agency.

8 B. Regulations adopted by the environmental
9 improvement board or the local board shall include at least the
10 following provisions:

11 (1) requirements for the submission of
12 relevant information, including information the department or
13 the local agency deems necessary to determine that regulations
14 and standards under the Air Quality Control Act or the federal
15 act will not be violated;

16 (2) specification of the deadlines for
17 processing permit applications; provided the deadline for a
18 final decision by the department or the local agency on a
19 construction permit application may not exceed:

20 (a) ninety days after the application is
21 determined to be administratively complete, if the application
22 is not subject to requirements for prevention of significant
23 deterioration, unless the secretary or the director grants an
24 extension not to exceed ninety days for good cause, including
25 the need to have public hearings; or

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1 (b) one hundred eighty days after the
2 application is determined to be administratively complete, if
3 the application is subject to requirements for prevention of
4 significant deterioration, unless the secretary or the director
5 grants an extension not to exceed ninety days for good cause,
6 including the need to have public hearings;

7 (3) that if the department or local agency
8 fails to take final action on a construction permit application
9 within the deadlines specified in Paragraph (2) of this
10 subsection, the department or local agency shall notify the
11 applicant in writing that an extension of time is required to
12 process the application and specify in detail the grounds for
13 the extension;

14 (4) a description of elements required before
15 the department or local agency shall deem an application
16 administratively complete;

17 (5) specification of the public notice and
18 comment period [~~and public hearing, if any~~] on a permit
19 application or draft permit required prior to the issuance of a
20 permit; provided that the permit regulations adopted:

21 (a) by the environmental improvement
22 board shall include provisions [~~governing notice to nearby~~
23 ~~states~~] that ensure that the public, adjacent landowners,
24 affected governmental agencies, area Indian nations, tribes or
25 pueblos and any other state whose air may be affected are

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1 provided notice; and

2 (b) by any local board shall include
3 provisions requiring that notice be given to the department of
4 all permit applications by any source that emits, or has a
5 potential emission rate of, one hundred tons per year or more
6 of any regulated air contaminant, including any source of
7 fugitive emissions of each regulated air contaminant, at least
8 sixty days prior to the date on which construction or major
9 modification is to commence;

10 (6) an opportunity for a public hearing before
11 the department, at which all interested persons shall be given
12 a reasonable opportunity to submit evidence, data, views and
13 arguments orally or in writing on the application or draft
14 permit and to examine witnesses testifying at the hearing. The
15 hearing shall be recorded. Any person submitting evidence,
16 data, views or arguments shall be subject to examination at the
17 hearing;

18 [~~(6)~~] (7) a schedule of construction permit
19 fees sufficient to cover the reasonable costs of:

20 (a) reviewing and acting upon any
21 application for such permit; and

22 (b) implementing and enforcing the terms
23 and conditions of the permit, excluding any court costs or
24 other costs associated with an enforcement action;

25 [~~(7)~~] (8) a schedule of emission fees

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1 consistent with the provisions of Section 502(b)(3) of the 1990
2 amendments to the federal act;

3 [~~(8)~~] (9) a method for accelerated permit
4 processing that may be requested at the sole discretion of the
5 applicant at the time the applicant submits a construction
6 permit application and that:

7 (a) allows the department or local
8 agency to contract with qualified outside firms to assist the
9 department or local agency in its accelerated review of the
10 construction permit application; provided that the department
11 or local agency can contract with a qualified firm that does
12 not have a conflict of interest; and

13 (b) establishes a process for the
14 department or local agency to account for the expenditure of
15 the accelerated permit processing fees;

16 [~~(9)~~] (10) allowance for additional permit
17 application fees, sufficient to cover the reasonable costs of
18 an accelerated permit application review process. Before the
19 applicant is notified that the permit application has been
20 determined to be complete, the department or local agency shall
21 give the applicant a reasonable estimate of costs of an
22 accelerated permit application review process;

23 [~~(10)~~] (11) specification of the maximum
24 length of time for which a permit shall be valid; provided that
25 for an operating permit such period may not exceed five years;

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1 and

2 [~~(11)~~] (12) for an operating permit only:

3 (a) provisions consistent with Sections
4 502(b) and 505(b) of the federal act providing: 1) notice to
5 and review and comment by the United States environmental
6 protection agency; and 2) that if the department or local
7 agency receives notice of objection from the United States
8 environmental protection agency before the operating permit is
9 issued, the department or the local agency shall not issue the
10 permit unless it is revised and issued under Section 505(c) of
11 the federal act;

12 (b) provisions governing renewal of the
13 operating permit; and

14 (c) specification of the conditions
15 under which the operating permit may be terminated, modified or
16 revoked and reissued prior to the expiration of the term of the
17 operating permit.

18 C. Except as provided in Subsection [θ] Q of this
19 section, the department or the local agency may deny any
20 application for:

21 (1) a construction permit if it appears that
22 the construction or modification:

23 (a) will not meet applicable standards,
24 rules or requirements of the Air Quality Control Act or the
25 federal act;

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1 (b) will cause or contribute to air
2 contaminant levels in excess of a national or state standard
3 or, within the boundaries of a local authority, applicable
4 local ambient air quality standards; or

5 (c) will violate any other provision of
6 the Air Quality Control Act or the federal act; and

7 (2) an operating permit if the source will not
8 meet the applicable standards, rules or requirements pursuant
9 to the Air Quality Control Act or the federal act.

10 D. The department or the local agency may specify
11 conditions to any permit granted under this section, including:

12 (1) for a construction permit:

13 (a) a requirement that such source
14 install and operate control technology, determined on a case-
15 by-case basis, sufficient to meet the standards, rules and
16 requirements of the Air Quality Control Act and the federal
17 act;

18 (b) individual emission limits,
19 determined on a case-by-case basis, but only as restrictive as
20 necessary to meet the requirements of the Air Quality Control
21 Act and the federal act or the emission rate specified in the
22 permit application, whichever is more stringent;

23 (c) compliance with applicable federal
24 standards of performance;

25 (d) reasonable restrictions and

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1 limitations not relating to emission limits or emission rates;
2 or

3 (e) any combination of the conditions
4 listed in this paragraph; and

5 (2) for an operating permit, terms and
6 conditions sufficient to ensure compliance with the applicable
7 standards, rules and requirements pursuant to the Air Quality
8 Control Act and the federal act.

9 E. This section does not authorize the department
10 or the local agency to require the use of machinery, devices or
11 equipment from a particular manufacturer if the federal
12 standards of performance, state regulations and permit
13 conditions may be met by machinery, devices or equipment
14 otherwise available.

15 F. The issuance of a permit does not relieve any
16 person from the responsibility of complying with the provisions
17 of the Air Quality Control Act and any applicable regulations
18 of the environmental improvement board or the local board. Any
19 conditions placed upon a permit by the department or the local
20 agency shall be enforceable to the same extent as a regulation
21 of its board.

22 G. A person who participated in a permitting action
23 before the department or the local agency shall be notified by
24 the department or the local agency of the action taken and the
25 reasons for the action. Notification of the applicant shall be

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1 by certified mail.

2 H. A person who participated in a permitting action
3 before the department or the local agency and who is adversely
4 affected by such permitting action may file a petition for
5 ~~[hearing]~~ review before the environmental improvement board or
6 hearing before the local board. ~~[The petition shall be made in~~
7 ~~writing to the environmental improvement board or the local~~
8 ~~board within thirty days from the date notice is given of the~~
9 ~~department's or the local agency's action.]~~ Unless a timely
10 petition ~~[for hearing]~~ is made, the decision of the department
11 or the local agency shall be final and not subject to judicial
12 review. The petition shall:

13 (1) be made in writing to the environmental
14 improvement board or the local board within thirty days from
15 the date notice is given of the department's or the local
16 agency's action;

17 (2) include a statement of the issues to be
18 raised and the relief sought; and

19 (3) be served on all other persons submitting
20 evidence, data, views or arguments in the proceeding before the
21 department or the local agency.

22 I. If a timely petition ~~[for hearing]~~ is made, the
23 environmental improvement board or the local board shall ~~[hold~~
24 ~~a hearing]~~ consider the petition within sixty days after
25 receipt of the petition. The environmental improvement board

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1 or the local board shall notify the petitioner and the
2 applicant or permittee, if other than the petitioner, by
3 certified mail of the date, time and place of the review or
4 hearing. [~~If the subject of the petition is a permitting~~
5 ~~action deemed by the environmental improvement board or the~~
6 ~~local board to substantially affect the public interest]~~ The
7 environmental improvement board or the local board shall ensure
8 that the public receives notice of the date, time and place of
9 the review or hearing. [~~The public in such circumstances shall~~
10 ~~also be given a reasonable opportunity to submit data, views or~~
11 ~~arguments orally or in writing and to examine witnesses~~
12 ~~testifying at the hearing. Any person submitting data, views~~
13 ~~or arguments orally or in writing shall be subject to~~
14 ~~examination at the hearing.~~

15 ~~J. The environmental improvement board or the local~~
16 ~~board may designate a hearing officer to take evidence in the~~
17 ~~hearing. All hearings shall be recorded.~~

18 ~~K.]~~ J. For review by the environmental improvement
19 board, the board shall review the record compiled before the
20 department, including the transcript of any public hearing held
21 on the application or draft permit, and shall allow any party
22 to submit arguments. The board may designate a hearing officer
23 to review the record and the arguments of the parties and
24 recommend a decision to the board. The board shall consider
25 and weigh only the evidence contained in the record before the

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1 department and the recommended decision of the hearing officer,
2 if any, and shall not be bound by the factual findings or legal
3 conclusions of the department. The board shall keep a record
4 of the review. Based on the review of the evidence, the
5 arguments of the parties and the recommendation of the hearing
6 officer, if any, the board shall sustain, modify or reverse the
7 action of the department.

8 K. Prior to the date set for review, if the
9 environmental improvement board determines that proposed
10 additional evidence, data, views or arguments are relevant and
11 there was good reason for the failure to present the evidence,
12 data, views or arguments in the proceeding before the
13 department, the board shall order that additional evidence,
14 data, views or arguments be taken by the department. Based on
15 the additional evidence, data, views or arguments, the
16 department may revise the permitting action and shall promptly
17 file with the environmental improvement board the additional
18 evidence, data, views or arguments received and the action
19 taken.

20 L. For review by the local board, the board shall
21 hold a hearing on the petition. The local board may designate
22 a hearing officer to take evidence in the hearing and recommend
23 a decision to the board. All interested persons shall be given
24 a reasonable opportunity to submit evidence, data, views and
25 arguments orally or in writing, and to examine witnesses

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1 testifying at the hearing. Any person submitting evidence,
2 data, views or arguments shall be subject to examination at the
3 hearing. All hearings shall be recorded. The burden of proof
4 shall be upon the petitioner. Based upon the evidence
5 presented at the hearing, [~~the environmental improvement board~~
6 ~~or~~] the local board shall sustain, modify or reverse the action
7 of [~~the department or~~] the local agency [~~respectively~~].

8 M. The environmental improvement board or the local
9 board shall notify the petitioner and all other participants in
10 the review of the action taken and the reasons for the action.

11 [~~L-~~] N. Notwithstanding any other provision of law
12 and subject to the provisions of Section 74-2-4 NMSA 1978, a
13 final decision on a permit by the department, the environmental
14 improvement board, the local agency, the local board or the
15 court of appeals that a source will or will not meet applicable
16 local, state and federal air pollution standards and
17 regulations shall be conclusive and is binding on every other
18 state agency and as an issue before any other state agency
19 shall be deemed resolved in accordance with that final
20 decision.

21 [~~M-~~] O. Subject to the provisions of Section 74-2-4
22 NMSA 1978, if the local board has adopted a permit regulation
23 pursuant to this section, persons constructing or modifying any
24 source within the boundaries of the local authority shall
25 obtain a permit from the local agency and not from the

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1 department.

2 [N-] P. Fees collected pursuant to this section
3 shall be deposited in:

4 (1) the state air quality permit fund created
5 by Section 74-2-15 NMSA 1978 if collected by the department; or

6 (2) a fund created pursuant to Section
7 74-2-16 NMSA 1978 if collected by a local agency pursuant to a
8 permit regulation adopted by the local board pursuant to this
9 section.

10 [O-] Q. The department may not deny an application
11 for a construction permit for a cotton gin if the applicant
12 proposes use of the best system of emissions reduction
13 currently in use by cotton gins in the United States, as
14 specified by regulation of the environmental improvement board,
15 and the cotton gin has a potential emission rate, considering
16 the use of the proposed emissions reduction system and the
17 proposed hours of operation, of not more than fifty tons per
18 year of any regulated air contaminant for which there is a
19 national ambient air quality standard. The construction permit
20 shall require that the applicant use the proposed emission
21 reduction system and limit the hours of operation to the hours
22 specified in the application. For purposes of this subsection,
23 "best system of emissions reduction" for cotton gins means a
24 system that will result in emissions reduction equal to or
25 greater than that obtained by the use of condenser screens,

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1 seventy-mesh screen or equivalent on low-pressure exhausts and
2 high-efficiency cyclone dust collectors on high-pressure
3 exhausts. "

4 Section 2. Section 74-2-9 NMSA 1978 (being Laws 1971,
5 Chapter 57, Section 1, as amended) is amended to read:

6 "74-2-9. JUDICIAL REVIEW - ADMINISTRATIVE ACTIONS. --

7 A. Any person adversely affected by an
8 administrative action taken by the environmental improvement
9 board, the local board, the secretary or the director other
10 than the adoption of a regulation, may appeal to the district
11 court [of appeals] pursuant to the provisions of Section
12 39-3-1.1 NMSA 1978. All appeals shall be upon the record made
13 at the hearing and shall be taken to the district court [~~of~~
14 ~~appeals~~] within thirty days following the date of the action.

15 B. [~~For appeals of regulations, the date of the~~
16 ~~action shall be the date~~] A person who is or may be adversely
17 affected by a regulation adopted by the environmental
18 improvement board or the local board may appeal the regulation
19 by filing a notice of appeal with the court of appeals within
20 thirty days of the filing of the regulation by the
21 environmental improvement board or the local board pursuant to
22 the State Rules Act.

23 C. Upon appeal pursuant to Subsection B of this
24 section, the court of appeals shall set aside the [~~action~~]
25 regulation only if found to be:

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- (1) arbitrary, capricious or an abuse of discretion;
- (2) not supported by substantial evidence in the record; or
- (3) otherwise not in accordance with law.

D. After a hearing and a showing of good cause by the appellant, a stay of the action being appealed may be granted:

(1) by the environmental improvement board, the local board, the ~~[department]~~ secretary or the ~~[local agency]~~ director, whichever took the action being appealed; or

(2) by the court ~~[of appeals]~~ if the environmental improvement board, the local board, the ~~[department]~~ secretary or the ~~[local agency]~~ director denies a stay or fails to act upon an application for a stay within sixty days after receipt of the application. "